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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL HOCKEY LEAGUE, Plaintiff, v. NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, Defendant.	:	16-CV-4287 (AJN)

PLAINTIFF'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Plaintiff National Hockey League (the "NHL" or "League"), submits this Reply Memorandum of Law in Support of its Motion for Summary Judgment seeking to vacate the arbitration award issued by the "Neutral Discipline Arbitrator" ("NDA") in an arbitration proceeding conducted pursuant to the collective bargaining agreement ("CBA") between the NHL and the National Hockey League Players' Association ("NHLPA" or the "Union").

INTRODUCTION

The NHLPA's opposition to the NHL's motion attempts to insulate the NDA's award from attack by invoking the familiar rule that a court may not second-guess an arbitrator's plausible interpretation of contract terms. The argument misses the point. The NHL's challenge to the award is not based on a disagreement with the NDA's interpretation of the CBA. Rather, it is based on the NDA's failure to apply the "substantial evidence" standard of review that he himself stated was applicable. The NDA acknowledged that standard applied, but then proceeded to make *de novo* factual findings, which the NHLPA acknowledges he was not permitted to do.

Faced with this dilemma, the NHLPA brushes off the NHL's objections as "piecemeal debates about certain of the Arbitrator's statements," and literally adds what they characterize as "magic words" to the NDA's opinion in an effort to show that the applicable standard was followed. (NHLPA Mem. at 12-13). However, it is the NDA's words that matter, not the NHLPA's rewrite of those words. As the Supreme Court held in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), an arbitration award "is legitimate only so long as it draws its essence from the collective bargaining agreement. When *the arbitrator's words* manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (Emphasis added).

ARGUMENT

The Arbitration Award Must be Vacated Because The NDA Exceeded His Authority, Not Simply Because He Reached An Erroneous Result

The NHLPA repeatedly mischaracterizes the basis of the NHL's challenge to the NDA's award. The challenge is not based on "the NHL's disagreement with the Arbitrator's view of the collectively-bargained standard of review." (NHLPA Reply Mem. at 5). Rather, the challenge is based on the NDA's failure to apply the collectively-bargained standard of review even as that standard was interpreted by the NDA himself.

First, the NHLPA's persistent reliance on *Kappos v. Hyatt,* 132 S. Ct. 1690 (2012), and *Garcia v. Board of Education of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008), continues to miss the point. In those cases, the Supreme Court and the Tenth Circuit, respectively, held that a federal district court had the authority to conduct *de novo* review of particular administrative findings because the governing statutes permitted such review. The holdings are inapposite here. The NHLPA has not argued that the NDA had the authority to conduct a *de novo* review. More importantly, the NDA himself did not interpret the CBA as according him the authority to conduct a *de novo* review. The NDA acknowledged during the hearing that "it's not a de novo hearing." NDA Hearing Tr. 129-30 (Gerba Decl. Ex. 1).

The NHLPA's opposition further confuses the issues by suggesting that the NDA's award cannot be disturbed because it derives from his interpretation of the authority vested in him by Article 18.13(c) of the CBA. Again, the Union misses the mark.

The interpretive question that the NDA posed in his opinion involved what he saw as a seeming inconsistency in Article 18.13(c). That section provides that the NDA's role is to review whether the final decision of the League finding a violation of League Playing Rules and imposing a suspension "were supported by substantial evidence." However, the same section

also provides that the NDA has authority to consider additional evidence that was not presented to the Commissioner. He reconciled these provisions by concluding that they "must authorize the NDA to decide whether the totality of the evidence presented at the NDA hearing comprises substantial support for the Commissioner's decision." NDA Award at 12 (Baumgarten Decl. Ex. 6). He did not hold that he had the authority to make *de novo* findings.

In fact, there is nothing in the NDA's two paragraph discussion of Article 18.13(c) (at pp. 11-12 of his opinion) that amounts to an interpretation of the CBA as according him anything more than the authority to take into account additional evidence that was presented to him but not presented to the Commissioner in determining whether the Commissioner's decision was supported by "substantial evidence." Although the NHLPA's reply papers suggest that the NHL's summary judgment motion ignores this point, we have already acknowledged that this was the NDA's interpretation. (*See* NHL August 26, 2016 Mem. at 19). To be clear, that interpretation is not the basis on which the NHL seeks vacatur of the award.

Rather, the fundamental flaw in the NDA's award is that after interpreting the scope of his authority under Article 18.13(c) (at pp. 11-12), the balance of his decision manifests an infidelity to that very authority. Ironically, the NDA's failure in this regard is highlighted by the NHLPA's own unsupported assertion that "the Arbitrator carefully explained why, on the record before him, Mr. Bettman's decision was not supported by substantial evidence…." (NHLPA Mem. at 5). The opinion contains no such explanation. The NDA engaged in no analysis at all concerning whether there was or was not substantial evidence to support the Commissioner's decision.

To the contrary, the NDA's opinion (consisting of the text both preceding and following the interpretive discussion contained on pp. 11-12) is devoted almost entirely to the NDA's own

fact-finding. We do not repeat here the discussion contained at pp. 14 -18 of our August 26, 2016 memorandum, which detailed how the NDA made his own findings – based largely on his "own version" (*see, e.g.,* NDA Award at 6, Baumgarten Decl. Ex. 6) of what happened based on his review of the video footage. Suffice it to reiterate that time after time the NDA articulated his disagreements with Commissioner Bettman by voicing his own conclusions about what Mr. Wideman and/or Mr. Henderson saw, thought, intended, felt and/or did, citing snippets of testimony from Messrs. Schneider and Walkom[1] but completely disregarding the question of whether there was substantial evidence supporting the Commissioner's conclusions.

The NHLPA shrugs off the NDA's actual language, characterizing the NHL's objections as "piecemeal debates about certain of the Arbitrator's statements." (NHLPA Mem. at 12). According to the NHLPA, the NDA's findings of fact were not actually findings of fact at all, but instead "simply formulations of the Arbitrator's conclusion 'based on the totality of the evidence presented to [him],' that Mr. Bettman's order was not based on substantial evidence." (*Id.* at 13). Although the NHLPA asserts that the NDA "carefully explained" why Commissioner Bettman's decision was not supported by substantial evidence, the Union now finds it necessary to suggest alternative language that the NDA might have used – but critically, did not:

> For example, [the NHL] claims that the Arbitrator substituted his judgment for Mr. Bettman's since he acknowledged that what Mr. Wideman "should have known [about the effect of his collision with the Linesman] . . . is not an easy question." NHL Mem. 17. But this statement is easily read to say that *in light of the substantial evidence standard,* the question of Mr. Wideman's intent was "not easy"; without that standard, the NHLPA submits, the evidence that Mr. Wideman did not intend to injure Linesman Henderson was overwhelming."

(NHLPA Mem. at 12) (emphasis in original).

[1] The NHLPA's opposition refers to the testimony of Calgary General Manager Brad Treliving. However, the NDA's opinion did not contain any reference to Mr. Treliving's testimony as a basis for the award.

The NHLPA's awkward attempt to correct the NDA's opinion highlights the very arguments that the NHL is making in support of its motion: A plain reading of the NDA's straightforward language makes perfectly clear that he did not make the slightest attempt to determine whether there was substantial evidence in support of Commissioner Bettman's decision. Indeed, even where the NDA referred to the "totality of the evidence," he ignored the substantial evidence standard of review and simply rendered his own finding:

> My fundamental disagreement with Commissioner Bettman's decision, is that, based on the totality of the evidence presented to me, I do not think that Wideman's behavior was animated by an intent to injure Henderson. . . .

NDA Award at 14 (Baumgarten Decl. Ex. 6) (emphasis added). The question for the NDA, however, was not what he believed Mr. Wideman's intent to have been, but whether Commissioner Bettman's decision had been supported by substantial evidence based on the totality of the record before the NDA.[2] That, however, was a question that the NDA never even attempted to analyze.

* * *

In *National Children's Center, Inc. v. Service Employees International Union, Local 500*, 68 F. Supp. 3d 96 (D.D.C. 2014), the court vacated an arbitration award reinstating an employee where: (i) the collective bargaining agreement had reserved to the employer the right to terminate for "gross misconduct," as well as the right to define "gross misconduct"; and (ii) the employee had engaged in conduct encompassed by the employer's definition of "gross misconduct." The Court explained:

> . . . the arbitrator denied NCC the benefit of the bargained-for terms of its collective bargaining agreement, specifically, NCC's right to distinguish and

[2] Under the "substantial evidence" standard, the appropriate inquiry "is whether there is substantial evidence for the findings made . . . not whether there is substantial evidence for some other finding that could have been, but was not, made." *Mazariegos v. Office of U.S. Attorney Gen.*, 241 F.3d 1320, 1324 (11th Cir. 2001).

> define "gross misconduct". . . . The collective bargaining agreement reserved to NCC the discretion to craft workplace rules and define "gross misconduct". . . . The arbitrator therefore ruled in contravention of the collective bargaining agreement by 'substitut[ing] his [own] judgment or discretion for NCC's judgment or discretion.

Id. at 102, citing *United Steelworkers of Am.*, 363 U.S. at 597.

Like the NHLPA here, the union in *NCC* argued that an arbitration award can only be vacated in "rare instances." The court held that the case presented just one of those rare instances because the arbitrator had exceeded his authority by substituting "his own judgment for the clear management rights provided in the collective bargaining agreement." *Id*. at 102-03. *See also 187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005) (vacating an award after finding that an arbitrator "exceeded his authority" by ordering reinstatement of an employee terminated for conduct that constituted just cause where the collective bargaining agreement permitted termination for just cause). Likewise, the NDA here substituted his own judgment for that of Commissioner Bettman notwithstanding the acknowledged limitation of his authority to review Commissioner Bettman's decision only to determine whether it was supported by substantial evidence. Accordingly, the arbitration award issued by the NDA should be vacated.

CONCLUSION

For the reasons set forth above and in the NHL's Memorandum of Law in Support of its Motion for Summary Judgment, the NHL's motion for summary judgment should be granted.

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Respectfully submitted,

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